IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974-1975

No. 74-776

NORMAN R. McHENRY and CORNELIUS SIMS BRADY,
Petitioners,

vs.

CITY OF MOBILE,
Respondent.

BRIEF OF RESPONDENT
In Lieu of Motion to Dismiss

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"OPINIONS" BELOW

No "Final Judgment or Opinion" entered. Exhibits A, B, and C, Petitioners' Petition.

JURISDICTION

Petitioners' Exhibits A, B, and C show that the inferred ground of Jurisdiction is non-existent.

Petitioners' Exhibits B and C, evidence that the discretionary power of the Supreme Court of Alabama to grant a Writ of

Certiorari was not exercised. Denial of the Writ was not an expression by the Alabama Supreme Court on the merits of the case. *Cooper v. State*, 287 Ala. 728, 252 So. 2d 108 (1971); ex parte *Ditton*, 292 Ala. 493, 295 So. 2d 412 (1974). Therefore, there is no "Final Judgment or Decree" by the Supreme Court of Alabama to comply with the first essential of Title 28, Section 1257(3), United States Code, requiring such "Final Judgment or Decree".

The Court of Criminal Appeals of Alabama has exclusive appellate jurisdiction of misdemeanors, including the violation of town and city ordinances, said court also having original jurisdiction and authority in the issuance and determination of remedial and original writs as are necessary to give it a general superintendence and control of jurisdiction inferior to it and in matters over which it has exclusive appellate jurisdiction. Code of Alabama, Title 13, Section 111(2) (4).

Though a Writ of Certiorari would not be appropriate to the Supreme Court of Alabama, said Writ could issue to the Court of Criminal Appeals of Alabama, if the requirements of Title 28, Section 1257 are met. *Western Union v. Priester*, 276 U. S. 252, 48 Sup. Ct. 234, 72 L. Ed. 555 (1928).

Exhibit A of Petitioners' Petition, being a writ of the Court of Criminal Appeals of Alabama, shows said Court to have remanded the appeals of Petitioners to the trial court for application of appropriate law in light of rulings by the U. S. Supreme Court, specifically *Heller v. New York*, 93 S. Ct. 2789 (1973), and cases cited therein, decided subsequent to the trial of Petitioners on February 27, 1973.

Petitioners' Petition, Exhibits A, B, and C, show the only actions taken by appellate courts in this matter, and show no "Final Judgment or Decree", the first requirement of Title 28, Section 1257, as a basis for jurisdiction.

"The requirement that a final judgment or decree be rendered by the highest court of the state (having appellate jurisdiction) before the Supreme Court may intervene in state litigation is not a mere technicality, to be easily scorned, but an important factor in the smooth working of our federal system." (Parenthesis added.) *Mont. Bldg. & Const. v. Ledbetter*, Ala. 1952, 344 U.S. 178; 73 S. Ct. 196, 97 L. Ed. 204.

STATEMENT OF THE CASE

If it could be thought that issues can be considered in spite of the state of this record, a statement of the case, in addition to the transcript, would include Petitioners' "Opinions Below" and Exhibits. To comport with the facts so shown, and the transcript, and additional facts as are known to Petitioners, the following specifics must be considered:

Page 21 of the Petition contains a copy of an ordinance (41-085) of the City of Mobile, which is not an amendment to the Obscenity Ordinance of the City, but is rather a separate evidentiary ordinance passed to comply, in movie film prosecutions, with the dictates of *Entertainment Ventures v. Brewer*, 306 F. Supp. 802, 812 (Hdn 7-9) (M. D. Ala.) (Three Judges Court) 1969. Ordinance 41-085 at the time of arrest and trial of petitioners did not contain Section 2, as shown on page 22 of the Petition. See Tr. 51, for amendment of 41-085.

At no place in the Petition do Petitioners even intimate that the procedures of Section 1 of Ordinance 41-085, as amended by Ordinance 41-166, were not precisely afforded to these Petitioners. Consequently, in fact, valid warrants for the arrest of Petitioners were issued by an impartial magistrate, after viewing the film and determining probable obscenity, which warrants were served while Petitioners were showing the film (Tr. 110-111). As an incident to the arrests, made during the act of

showing the film previously viewed by the magistrate, the specifics of the act of showing, the film, was appropriated.

It is reiterated that Petitioners do not even intimate that the adversary hearing, within 72 hours of appropriation of the film, was not afforded Petitioners, all in accord with Ordinance 41-085, as amended, Section 1, in accord with Entertainment Ventures, *supra.*

There is no known U. S. Supreme Court decision specifically negating the procedures above outlined.

Permitting the orderly remandment of the Court of Criminal Appeals can accomplish a comprehensive inclusion in the record, for the benefit of any appellate court, of the precise procedures afforded the Petitioners, which this record does not contain. The confusion caused by the present incomplete record in the Court of Criminal Appeals is evident by its cursory, and obviously incorrect, conclusions as to what rights Petitioners were afforded at the time of arrest, under Section 1 of the evidentiary ordinance of the City, No. 41-183, as amended (not shown in this petition.) (Tr. 51).

With a complete record, an issue may exist.

II

The transcript shows in several places (Tr. 99-100, 105, 110-111) that Petitioners were present at the time of the showing of the film, one as manager, the other admittedly displaying the film and able to see it, when arrested. The jury question of "knowledge" of Petitioners is not for this Court, inasmuch as the City Obscenity Ordinance 36-022, as amended (Tr. 55), requires knowledge, and the Ordinance is not attacked on this issue on any grounds set out in Title 28, Section 1257(3).

III

The validity of the obscenity ordinance of the City at the time of the trial, under the U. S. Supreme Court rules prevailing at the time, has been considered in a case taken to the U. S. Supreme Court. We cite Ballew v. Robinson Case No. 71-292, October Term, 1971. That action consisted of a fifty-four page complaint attacking the City Ordinance 36-022 as amended by Ordinance 41-183 (Tr. 55), and actions resulting from its application in the U. S. District Court for the Southern District of Alabama resulted in a Judgment and Order of the District Court in part as follows: (Respondents' Brief, page A-26)

> "It is ordered, adjudged and decreed by the Court as follows:
>
> 1. The City of Mobile Ordinance No. 41-183 (Ordinance 36-022(2) as amended) is constitutional as written and petitioners' prayer to have the ordinance declared void is hereby denied."

The District Court was affirmed by the United States Court of Appeals for the Fifth Circuit, 447 F. 2d 584, May 1971; Cert. Den. Nov. 9, 1971.

We quote from the Conclusions of Law of the District Court (Respondent's Brief, page A-13):

> "The acts of the City based on its obscenity ordinance followed, in time, the decision of *Entertainment Ventures v. Brewer*, 306 F. Supp. 802. It is evident to me that the amendment of the City obscenity ordinance, and the method of its application by the City, follow the dictates of Entertainment Ventures.
>
> "None of the alleged grounds of unconstitutionality of the amended obscenity ordinance are applicable in view of the constructions arrived at in Entertainment Ventures. Specifically, I find as in that case the term 'utterly

without redeeming social value' is construed into the first sentence of the definition of obscenity found in the amended obscenity ordinance of the City. In fact, there can be no doubt that the City understands that such must be the case, as the ordinance states that (as a thing to be 'obscene' must be utterly without redeeming social value), such 'obscenity' obviously is utterly without redeeming social value and is therefore a public nuisance."

It appears to this Counsel that the action of the Court of Criminal Appeals of Alabama, in light of the above considerations, was an attempt to mime the U. S. Supreme Court in the *Miller v. California*, 93 S. Ct. 2607, 36 L. Ed. 2d and *Heller v. New York*, 93 S. Ct. 2789 (1973) cases. And from the above considerations, and the confusion of the Court of Criminal Appeals, remandment seems the only appropriate action.

CONCLUSION

Respondent respectfully represents to this Court that the Petition for a Writ of Certiorari should be denied, for lack of jurisdiction, as well as for the purposes cited by the Court of Criminal Appeals of Alabama.

Respectfully submitted

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